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No. 95-489

In the Supreme Court of the United States

OCTOBER TERM, 1995

COLORADO REPUBLICAN
FEDERAL CAMPAIGN COMMITTEE
AND DOUGLAS JONES, TREASURER, PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 2 U.S.C. 441a(d), which permits political party committees to make a limited amount of coordinated expenditures in excess of the contribution limits applicable to coordinated expenditures by others, violates the First Amendment rights of party committees.

2. Whether the court of appeals erred by giving deference to the Federal Election Commission's construction of 2 U.S.C. 441a(d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-21a) is reported at 59 F.3d 1015. The opinion of the district court (Pet. App. 22a-36a) is reported at 839 F. Supp. 1448.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1995. A suggestion for rehearing in banc was denied on September 6, 1995. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on September 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the Federal Election Campaign Act of 1971 (FECA or Act), 2 U.S.C. 431 *et seq.* The Act limits contributions to candidates for federal office. Individuals may contribute no more than $1,000, and multicandidate political committees no more than $5,000, with respect to any election. 2 U.S.C. 441a(a)(1)(A) and (2)(A). The Act also provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or his agents "shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i).

An exception to the generally applicable limits permits the national and state committees of a political party to make additional coordinated expenditures "in connection with the general election campaign of candidates for Federal office." 2 U.S.C. 441a(d)(1). In elections for the United States Senate, the extended limit is the greater of $20,000 or 2 cents times the voting age population of the State. 2 U.S.C. 441a(d)(3)(A). If a state party committee chooses not to make the coordinated expenditures permitted by law, it may assign its right to do so to a designated agent, such as a national committee of the party. See *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981) (*DSCC*). The Federal Election Commission (FEC)[1] has determined that

[1] The Commission is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, and 437g. Congress has expressly authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. 437c(b)(1) and 437d(e); and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h.

only an expenditure for a communication referring to a "clearly identified candidate" and containing an "electioneering message" constitutes a "coordinated party expenditure" subject to the limitation of Section 441a(d). FEC Advisory Op. 1985-14, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5819 (May 30, 1985); see FEC Advisory Op. 1984-15, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5766 (May 31, 1984).

The FECA also requires detailed recordkeeping and reporting of all contributions and expenditures. 2 U.S.C. 432, 444. Coordinated expenditures made pursuant to Section 441a(d) must be reported separately from other contributions and expenditures. 2 U.S.C. 434(b)(4)(H)(iv).

2. Petitioner Colorado Republican Federal Campaign Committee voluntarily assigned to the National Republican Senatorial Committee its entire coordinated expenditure authority ($103,248) for the 1986 Senate campaign. Pet. App. 9a. Petitioner subsequently spent $15,000 to broadcast a radio advertisement, "Wirth Facts #1," attacking the active Senate campaign of then-Representative Timothy E. Wirth. The text of the advertisement read as follows:

> Paid for by the Colorado Republican State Central Committee.
>
> Here in Colorado we're used to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the

> last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment.
>
> Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts.

Id. at 6a-7a & n.1. At a press conference contemporaneous with the broadcast of the advertisement, the chairman of the Colorado Republican Party explained that only after "the public know[s] what Tim Wirth's record really is * * * will the voters be able to make an informed decision regarding who will be Colorado's next U.S. Senator." C.A. App. 318.

After investigating an administrative complaint filed pursuant to 2 U.S.C. 437g(a)(1), the Commission determined that petitioner's expenditures on "Wirth Facts #1" were coordinated party expenditures made "in connection with" a campaign for federal office, and were therefore subject to the limitations of 2 U.S.C. 441a(d). Because petitioner had previously assigned away its entire coordinated expenditure authority, the Commission found probable cause to believe that petitioner had violated 2 U.S.C. 441a(f), which prohibits expenditures in violation of Section 441a. Because petitioner had failed to report the expenditures as expenditures subject to Section 441a(d), the FEC also found probable cause to believe that petitioner had violated the reporting requirements of 2 U.S.C.

434(b)(4)(H)(iv) and 434(b)(6)(B)(iv). Pet. App. 56a; see *id.* at 43a-46a.[2]

3. After conciliation efforts under 2 U.S.C. 437g(a)(4) proved unsuccessful, the Commission authorized the filing of this civil enforcement action. The district court granted petitioners' motion for summary judgment. Pet. App. 22a-36a. The court concluded that the expenditure in question had not been made "in connection with the general election campaign of a candidate for Federal office" within the meaning of Section 441a(d)(3). In the district court's view, a coordinated expenditure is made "in connection with" a federal election campaign only if the communication in question contains "express advocacy" of the election or defeat of a particular candidate. Pet. App. 28a-32a. The court placed substantial reliance on *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), which involved a prohibition (2 U.S.C. 441b(a)) on independent expenditures by designated corporate entities "in connection with any election to any political office." The Court in *MCFL* held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249. The district court in the instant case, applying the canon of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning," Pet. App. 28a (internal quotation marks omitted), concluded that the phrase "in connec-

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[2] The administrative complaint also challenged petitioners' expenditures on two other radio advertisements and two pamphlets, all of which criticized Representative Wirth's record without alluding to his ongoing Senate campaign. The Commission did not find probable cause to believe that those expenditures violated the Act. Pet. 3-4; see Pet. App. 93a-105a.

tion with" should be given the same construction in Section 441a(d)(3) as in Section 441b. Pet. App. 28a-29a. The court rejected the FEC's position that the phrase "in connection with," as used in Section 441a(d)(3), should be construed to cover communications that contain a "clearly identified candidate" and an "electioneering message." See Pet. App. 29a. The court concluded that "Wirth Facts #1" did not contain "express advocacy" of Wirth's defeat, and that petitioners' expenditure on the advertisement therefore was not covered by Section 441a(d)(3). Pet. App. 32a-35a.

4. The court of appeals reversed. Pet. App. 5a-21a. The court first stated that "[t]he FECA does not clearly manifest the meaning Congress intended to attach to the 'expenditures in connection with' language in § 441a(d)(3)." *Id.* at 10a. The court found *MCFL* inapposite, since the independent expenditures limited by Section 441b are substantially different—both in their treatment under the FECA and in the degree of protection afforded them by the Constitution—from the coordinated expenditures at issue here. Pet. App. 10a-14a. In light of the FEC's "'primary and substantial responsibility for administering and enforcing' the FECA," *id.* at 15a (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 109 (1976)), the court of appeals concluded that the Commission's "construction of § 441a(d) as regulating political committee expenditures depicting a clearly identified candidate and conveying an electioneering message is a reasonable one to which [the court] must defer," Pet. App. 15a-16a. The court found that Representative Wirth was a clearly identified candidate for the Senate at the time "Wirth Facts #1" was broadcast, *id.* at 17a,

and that the advertisement "unquestionably contained an electioneering message," *id.* at 18a.

The court of appeals then addressed and rejected petitioner's constitutional challenge to Section 441a(d). The court observed that "[t]he primary purpose of the contribution and expenditure caps in the FECA [is] to prevent corruption or the appearance of corruption," Pet. App. 19a, and that "[t]he same reasoning the Supreme Court used to uphold the constitutionality of other contribution limitations applies when analyzing the constitutionality of limits on coordinated expenditures by political committees," *id.* at 20a. The court rejected the claim that contributions from committees operated by a political party can never be corrupting, *ibid.*, and concluded that "[b]y treating coordinated expenditures as contributions, the FECA effectively precludes political committees from literally or in appearance, 'secur[ing] a political *quid pro quo* from current and potential office holders,'" *id.* at 21a (quoting *Buckley* v. *Valeo*, 424 U.S. at 26). The court also rejected petitioner's argument that Section 441a(d) is a content-based restriction on speech, finding that it is instead a "monetary cap" applied as "a consequence of the funding source." Pet. App. 21a.

ARGUMENT

The decision of the court of appeals is not in conflict with any decision of this Court or of any other court. Indeed, petitioners do not contend that any prior judicial decision has held Section 441a(d) to be unconstitutional or has adopted the interpretation of that Section espoused by petitioners.

1. a. Beginning with *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court has recognized a sharp constitu-

tional distinction between limitations on contributions to political candidates and limitations on independent expenditures. The Court in *Buckley* upheld the FECA's limitations on contributions because they serve a compelling interest in foreclosing opportunities for the corruption of candidates. The Court recognized that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." 424 U.S. at 26-27. The Court struck down the Act's limitations on independent expenditures, however, reasoning that "[t]he absence of prearrangement and coordination of an [independent] expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 47. The Court has continued to emphasize the "fundamental constitutional difference" between contributions and independent expenditures, *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985) (*NCPAC*), and has uniformly upheld the Act's restrictions on contributions in candidate elections. See, *e.g.*, *California Medical Ass'n* v. *FEC*, 453 U.S. 182 (1981); *FEC* v. *National Right to Work Committee*, 459 U.S. 197 (1982) (*NRWC*).

Because it is "[t]he absence of prearrangement and coordination" in an independent expenditure that alleviates the danger of *quid pro quo* corruption, *Buckley*, 424 U.S. at 47, Congress has validly determined that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, * * * shall be

considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). See *Buckley*, 424 U.S. at 46 ("expenditures controlled by or coordinated with the candidate and his campaign * * * are treated as contributions rather than expenditures under the Act"); *NCPAC*, 470 U.S. at 492 (coordinated expenditures "are considered 'contributions' under the FECA, * * * and as such are already subject to [the] $1,000 and $5,000 limitations in §§ 441a(a)(1), (2)"). This Court has also recognized that, because of a party committee's close relationship with the party's candidates, all expenditures by such a committee must be considered coordinated. See *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 28-29 n.1 (1981) (*DSCC*) ("expenditures by party committees are known as 'coordinated' expenditures" because "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates").

b. Petitioner contends (Pet. 5-6, 12-14) that Section 441a(d) must be found unconstitutional unless the Commission can produce record evidence showing that federal candidates have in fact been corrupted by contributions from a political party. That argument ignores this Court's holding in *Buckley*, noted by the court of appeals in the present case (Pet. App. 21a), that avoiding actual corruption is not the only compelling interest justifying limits on contributions and coordinated expenditures. As the *Buckley* Court recognized, "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27. See *NRWC*, 459 U.S. at 208 ("[I]n

Buckley * * * we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption."). Because the *Buckley* Court found the appearance of corruption to be inherent in the process of coordination, it did not require evidence of actual corruption by particular classes of contributors.[3] Although the Court assumed that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action," 424 U.S. at 29, it upheld the FECA's $1,000 limit on contributions to candidates and political committees. The Court explained that it is "difficult to isolate suspect contributions," and that "Congress was justified in concluding that the interest in safeguarding against the appearance of

[3] There is no basis for petitioner's attempt (Pet. 15-17) to distinguish party committees from other political committees subject to the contribution limits upheld in *Buckley*. First, *all* political committees are voluntary associations that can accept contributions only in amounts specified in the Act and must publicly report their contributions and expenditures. Second, *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *MCFL*, 479 U.S. at 263-264, found a small class of political advocacy organizations to be exempt only from statutory limits on *independent* expenditures. In *MCFL*, the Court contrasted the limitations on independent expenditures with the regulation of contributions from political advocacy corporations such as MCFL, *id.* at 259-262, and confirmed that such corporations were subject to the same statutory restrictions on candidate contributions as were other corporations, *id.* at 264 n.13. The discussion from *NCPAC* (470 U.S. at 498) quoted by petitioner similarly referred only to independent expenditures. Finally, the disagreement of some law review writers with Congress's policy choices hardly renders those legislative judgments unconstitutional.

impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30.

In dealing with contributions and coordinated expenditures, the Court has "accept[ed] Congress' judgment" and has refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *NRWC*, 459 U.S. at 210. As the court of appeals observed, "[t]he members of Congress who enacted this law were surviving veterans of the election campaign process, and all were members of organized political parties. They should be considered uniquely qualified to evaluate the risk of actual corruption or appearance of corruption from large coordinated expenditures by political parties." Pet. App. 20a. Indeed, this Court has recognized that the limits on coordinated expenditures by political parties serve the same purpose as FECA's other contribution limits: "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *DSCC*, 454 U.S. at 41 (citing *Buckley*, 424 U.S. at 25). In *DSCC* the Court held voluntary agreements between state and national committees of a political party regarding Section 441a(d) expenditures to be permissible only because the Commission's decision to permit such agreements did not expand "the limitations on the amount that can be spent under the Act" by a political party. 454 U.S. at 41. That decision forecloses petitioner's argument that Section 441a(d) does not serve the anti-corruption purpose that was found in *Buckley* to justify

the statute's other restrictions on political contributions.[4]

c. Petitioner contends (Pet. 7) that under the court of appeals' approach, "political speech by political parties merits less protection than speech by banks, corporations, trade unions, and the like." In fact the reverse is true. The corporate entities subject to Section 441b are completely prohibited from making contributions or coordinated expenditures, 2 U.S.C. 441b(a); see *California Medical Ass'n*, 453 U.S. at 200-201, while Section 441a(d) "authorizes limited expenditures by the national and state committees of a political party in connection with a general election campaign for federal office * * * which otherwise would be impermissible" because of the statutory limitation on contributions, *DSCC*, 454 U.S. at 28. See also H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976) ("but for this subsection, these expenditures would be covered by the contribution limitations"). Political parties are subject to distinct restrictions only in the sense that they have been

[4] Petitioner argues (Pet. 14) that Section 441a(d)'s population-based formula for calculating the coordinated party expenditure limit in each State somehow "refute[s] an anti-corruption purpose." The statutory formula simply reflects Congress's recognition that the expense of campaigning is generally proportional to the number of potential voters in a particular election. The formula preserves a roughly comparable role for political parties in Senate campaigns in each State, thus striking what Congress believed to be the appropriate balance between the prevention of actual or apparent corruption and the desire to "assur[e] that political parties will continue to have an important role in federal elections." *DSCC*, 454 U.S. at 41. Determining the precise level of appropriate contribution limits is a legislative judgment that does not raise constitutional concerns. *Buckley*, 424 U.S. at 30.

determined to be "incapable of making 'independent' expenditures in connection with the campaign of their party's candidates." *DSCC*, 454 U.S. at 28-29 n.1. Petitioners do not challenge that determination directly, however, nor do they cite any decision calling it into question, and this Court in *DSCC* quite clearly accepted that determination as the appropriate starting point for its analysis. There is consequently no basis for petitioners' claim that political parties are unfairly disadvantaged vis-a-vis other contributors.

2. This Court recognized in *DSCC* that the Commission's broad statutory powers and its "inherently bipartisan" character make it "precisely the type of agency to which deference should presumptively be afforded." 454 U.S. at 37. The court of appeals' decision in the instant case is consistent with other court of appeals decisions that have given deference to the Commission's construction of the FECA as expressed in formal advisory opinions issued pursuant to 2 U.S.C. 437f. See, *e.g.*, *FEC* v. *Ted Haley Congressional Committee*, 852 F.2d 1111, 1114-1115 (9th Cir. 1988); *Orloski* v. *FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986).[5]

[5] Petitioners' contention (Pet. 24) that Section 437f precludes deference to the Commission's advisory opinions unless they are promulgated as regulations was neither pressed nor passed upon below, and this Court therefore should not consider it. See, *e.g.*, *Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984); *Delta Air Lines* v. *August*, 450 U.S. 346, 362 (1981). In any event, the argument is without merit. Advisory Opinions 1984-15 and 1985-14 did not adopt legislative rules of the sort requiring a formal rulemaking, but merely interpreted the terms of the Act "with respect to a specific transaction or activity," as provided in Section 437f. The construction of the

Petitioners contend that the Commission's reading of Section 441a(d) is foreclosed by this Court's decisions in *MCFL*, 479 U.S. at 249, and *Buckley*, 424 U.S. at 74-79, which construed other provisions of the Act to apply only to communications that expressly advocate the election or defeat of a clearly identifiable candidate. The Court's construction of those provisions, however, was based on the constitutional concerns that would have attended any effort to impose more stringent limitations on independent expenditures. See *Buckley*, 424 U.S. at 78-79; *MCFL*, 479 U.S. at 248-249. As we explain above, see pages 7-9, *supra*, this Court has consistently recognized that regulation of contributions and coordinated expenditures is far less problematic. See *Orloski*, 795 F.2d at 166-167 ("the Court limited [the express advocacy definition] to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions."). As the court of appeals recognized, "[t]he distinction between independent expenditures and political party expenditures that are deemed to be contributions, and their different treatment by the Supreme Court, negates the necessity that 'expenditures in connection with' be construed identically in different sections of the

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Act enunciated in those advisory opinions is analgous to an interpretive rule, to which a reviewing court owes deference. See, *e.g.*, *Wagner Seed Co.* v. *Bush*, 946 F.2d 918, 922 (D.C. Cir. 1991), cert. denied, 503 U.S. 970 (1992); *Kennedy* v. *Shalala*, 995 F.2d 28, 30 n.3 (4th Cir. 1993); *American Land Title Ass'n* v. *Clarke*, 968 F.2d 150, 154 (2d Cir. 1992), cert. denied, 113 S. Ct. 2959 (1993).

FECA." Pet. App. 13a-14a. See *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934).[6]

Application of the "express advocacy" standard to the Act's limits on contributions and coordinated expenditures would permit any donor—including a corporation, union, or other interest group—to coordinate its own political expenditures with a candidate in exchange for the prospect of favorable treatment in office. Since it is the "prearrangement and coordination" with the candidate that creates the appearance of corruption in coordinated expenditures (see pages 8, 9-10, *supra*), such an expenditure can suggest the existence of a corrupt *quid pro quo* even if it is not spent on express advocacy. As this Court has observed, there would not be "much difficulty [in] devising expenditures that skirted the restriction on express advocacy of election or defeat but never-

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[6] Contrary to petitioners' contention (Pet. 21), the *Buckley* Court did not apply the express advocacy test to the contribution disclosure requirement of former 2 U.S.C. 434(e) (Supp. IV 1974). Instead, the Court construed "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee * * * but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate," and found that "[s]o defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign." 424 U.S. at 78. It was only "[w]hen [the Court] attempt[ed] to define 'expenditure' in a similarly narrow way" that the Court found the "line-drawing problems" that required the express advocacy test. *Id.* at 78-79. In fact, the Court did not find that a narrowing construction was required even for independent expenditures of political committees; rather, it concluded that all expenditures by such committees "can be assumed to fall within the core area sought to be addressed by Congress" because "[t]hey are, by definition, campaign related." *Id.* at 79.

theless benefited the candidate's campaign." *Buckley*, 424 U.S. at 45. Acceptance of petitioners' position would thus substantially impair the Act's effectiveness in reducing both the fact and the appearance of political corruption.

Finally, petitioners contend (Pet. 17-19) that Section 441a(d), as construed by the Commission, is impermissibly content-based and unconstitutionally vague. As the court of appeals recognized (Pet. App. 21a), the purpose of the statutory restrictions on coordinated expenditures is to limit the opportunity for corrupt transactions, not the dissemination of disfavored messages. Since the applicability of those restrictions does not rest on "disagreement with the message * * * convey[ed]," it is sufficiently content-neutral to satisfy constitutional requirements. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). Indeed, the "express advocacy" test proposed by petitioners is no less content-based than the standard adopted by the Commission and approved by the court of appeals. In any event, this Court has consistently recognized that limitations on contributions and coordinated expenditures similar to those imposed by Section 441a(d)(3) serve compelling governmental interests and therefore survive strict scrutiny. See page 8, *supra*.

Petitioners' vagueness argument is similarly without merit. People of "common intelligence," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1973), would have no difficulty understanding that an advertisement explicitly linking an attack on the record of an opposing candidate with his ongoing Senate campaign

contained an "electioneering message."[7] In such circumstances neither the FECA nor the Commission's construction of it can be found unconstitutionally vague, even if the Act "may leave room for uncertainty at the periphery." *NRWC*, 459 U.S. at 211. Moreover, the statute provides a procedure for obtaining an advisory opinion from the Commission, see 2 U.S.C. 437f, which enables a party committee to "remove any doubt there may be as to the meaning of the law," *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973), with respect to a proposed expenditure. By "offer[ing] a prompt means of resolving doubts with respect to the statute's reach," Section 437f "mitigates whatever chill may be induced" by the Act. *Martin Tractor Co.* v. *FEC*, 627

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[7] Petitioners observe (see Pet. 19) that the Commission found probable cause to believe that their expenditure on "Wirth Facts #1" was covered by Section 441a(d)(3) but did not make a similar finding with respect to their expenditures on other advertisements critical of then-Representative Wirth. Petitioners contend (Pet. 19) that no meaningful difference between the advertisements exists and that the Commission's disparate treatment of them demonstrates the vagueness of the agency's standard. There is no merit to that contention. Unlike the other advertisements in question, "Wirth Facts #1" expressly linked its criticisms to Wirth's ongoing Senate campaign and explicitly challenged the integrity of Wirth's campaign statements. See Pet. App. 93a-105a; C.A. App. 318 (at press conference contemporaneous with broadcast of "Wirth Facts #1," Chairman of Colorado Republican Party asserted that Wirth had "purchased television time to baldly misstate his record on two key issues: defense and federal spending"). That distinction was clearly relevant to the question whether the advertisements at issue contained an "electioneering message."

F.2d 375, 384-385, 386 n.44 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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